U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 May 2005

In the Matter of:

CHARLES HYDEN,
Claimant,

v. **Case No.: 2003-BLA-06338**

**HI FLAME COAL COMPANY/
SECURITY INSURANCE COMPANY OF
HARTFORD**,
Employer/Carrier, and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,**
Party-in-Interest.

Appearances:

Zaring Robertson, Esq., Morgan, Bailey & Collins, Richmond, KY[1]
For Claimant

Denise Kirk Ash, Esq., Lexington, KY
For Employer

Neil A. Murholt, Esq., Office of the Solicitor, Nashville, TN
For the Director

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by Claimant Charles Hyden ("Claimant") on January 10, 2002. There were no previous claims filed. The putative responsible operator is Hi Flame Coal, Inc. ("Employer") which is insured through the Security Insurance Company of Hartford ("Carrier").

[1] Mr. Morgan moved to withdraw his law firm as counsel for the Claimant prior to issuance of this decision. That motion is **GRANTED** herein and Claimant is now unrepresented.

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim,[2] as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also applicable, as this claim was filed after January 19, 2001. 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[3] The Department of Labor amended the regulations on December 15, 2003, solely for the purpose of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments made. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

The instant claim was filed on January 10, 2002. (DX 2).[4] Claimant was examined for the Department of Labor by Glen Baker, M.D. on June 1, 2002. (DX 10). On November 8, 2002, the District Director issued a Schedule for the Submission of Additional Evidence, which stated that Claimant would not be entitled to benefits if a decision were issued at that time and that the named coal mine operator ("Hi Flame Coals Inc") was the responsible operator. (DX 18). A Proposed Decision and Order, Denial of Benefits (issued by the District Director on May 6, 2003) determined that the Claimant was not entitled to benefits because the evidence did not show that the Claimant had pneumoconiosis, that the disease was caused at least in part by his coal mine work, or that he was totally disabled by the disease. (DX 23). The District Director also found that Claimant worked as a coal miner for seven years, during the period from 1951 until January 1, 1972. *Id.* The responsible operator was again identified as "Hi Flame Coals Inc." *Id.* Claimant, through counsel, requested a hearing and the case was transferred to the Office of Administrative Law Judges for a hearing on July 25, 2003. (DX 24, 27).

A hearing in the above-captioned matter was held on April 30, 2004 in London, Kentucky. All parties, including the Director, submitted Designation of Evidence/BLBA Evidence Summary Forms. The Claimant was the only witness to testify. At the hearing, Director's Exhibits 1 through 27 ("DX 1" through "DX 27") and Administrative Law Judge's Exhibit 1 ("ALJ 1") were admitted into evidence. However, the Employer was precluded from submitting the Claimant's deposition as an exhibit, although the parties were allowed to use it for impeachment purposes. Also, the Director's objection to the responsible operator issue (because it was raised less than 30 days prior to the hearing, in contravention of the Notice of Hearing and Prehearing Order) was rejected because there was no prejudice shown. The record closed at the end of the hearing but the parties were allowed 60 days to submit optional briefs or written closing arguments, which period could be extended by stipulation. Thereafter, the briefing

[2] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[3] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

[4] Director's Exhibits 1 through 27, admitted into evidence at the April 30, 2004 hearing, will be referenced as "DX" followed by the exhibit number and the hearing transcript will be referenced as "Tr." followed by the page number.

period was extended by stipulation. The Employer/Carrier's Post Hearing Brief was filed on July 20, 2004 and the Director's Post-Trial Brief was filed on July 21, 2004.

On May 10, 2005, McKinnley Morgan, Esq., on behalf of Morgan, Madden, Brashear & Collins, PLLC, filed a Motion to Withdraw and Notice to Claimant, pursuant to which he requested an order permitting his firm to withdraw as counsel for the Claimant in this matter. In view of the limited number of attorneys in the firm able to properly and completely represent black lung claimants and the lack of profit in handling black lung cases, the firm has elected not to represent black lung claimants. For good cause shown, the Motion to Withdraw is **GRANTED**. **SO ORDERED.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The issues before me are identity of responsible operator (and the related issue of whether the Claimant's most recent period of cumulative employment of not less than one year was with the Employer), length of coal mine employment (beyond seven years), existence of pneumoconiosis, its casual relationship with coal mine employment, total disability, and causation of total disability (DX 27, Tr. 14). Additional issues (concerning the new regulations and the procedures applied thereunder) were listed for appellate purposes. (DX 27). At the hearing, Employer withdrew the issues of miner, post 1969 employment, and timeliness. (Tr. 14). Although the Employer agreed to the seven years of coal mine employment found by the Director, the Claimant did not agree to that finding as a stipulation. (Tr. 14).

Medical Evidence

Interpretations of chest X-rays taken between October 2001 and September 2003, all of which utilize the ILO system and are in compliance with the regulatory standards, are summarized below.

Exhibit No./ Party designating	**Date of X-ray/ Reading**	**Physician/ Qualifications[5]**	**Interpretation**
DX 12 Claimant Initial (submitted by Claimant and designated by Director)	**05/16/2001** same	G. Baker A-reader,[6] BCP	Pneumoconiosis 1/0, s/t, lower 4 zones; bilateral pleural thickening (plaque); em [emphysema]. Quality 3 (contrast).

[5] BCR refers to a board certified radiologist and BCP refers to a physician who is board certified in internal medicine with the subspecialty of pulmonary disease. B-reader refers to a physician certified by NIOSH.

[6] According to the B-reader list appearing at the OALJ website (www.oalj.dol.gov), of which I take official (administrative judicial) notice, Dr. Baker was certified as a B Reader from February 1, 1993 to January 31, 2001, as an A Reader from February 1, 2001 to May 31, 2002, and as a B Reader from June 1, 2002 until May 31, 2006.

Exhibit No./ Party designating	Date of X-ray/ Reading	Physician/ Qualifications[5]	Interpretation
DX 10 DOL Exam	**06/01/2002** same	G. Baker B-reader,[7] BCP	Pneumoconiosis 1/0, s/t, lower 4 zones; pleural plaque on left; id [ill defined diaphragm]; ? infiltrate LLL [lower left lobe]. Quality 2 (underexposed).
DX 10 DOL Exam [Quality reading]	06/01/2002 07/05/2002	E.N. Sargent BCR, B-reader	Quality 3 (illegible – "contrasts"?; "overlying arms"?) Subpleural fat. [Quality Reading Only].
DX 13 Employer Rebuttal to DOL Exam.	06/01/2002 01/30/2003	B. Broudy B-reader, BCP	Completely negative on ILO form; Profusion 0/0. Report notes "a few scattered calcifications." Quality 2 (underpenetration, scapular overlay).
DX 11 Employer Initial	**08/07/2002** same	A. Dahhan B-reader, BCP	Negative for pneumoconiosis; em [emphysema]. Quality 1.

Pulmonary function tests taken on May 16, 2001 (DX 12) (previous Baker examination, submitted by Claimant and designated by Director); June 1, 2002 (DOL Baker examination) (DX 10); and August 7, 2002 (pre- and post-bronchodilator) (Dahhan examination, Employer Initial Evidence) (DX 11) produced the following results:

Exhibit No.	Date/ Physician	Age/Height	FEV1	FVC	MVV	FEV1/FVC
DX 12	05/16/2001 G. Baker	67 68 inches	0.85 (pre)	2.30 (pre)	Not done [Attempted]	37% (pre)
DX 10	06/01/2002 G. Baker	68 68 inches	1.14 (pre)	2.86 (pre)	Not done	40% (pre)
DX 11	08/07/2002 A. Dahhan	68[8] 170 cm [67 inches]	1.28 (pre) 1.42 (post)	2.44 (pre) 2.54 (post)	39 (pre) 49 (post)	52% (pre) 56% (post)

Under subparagraph (i) of section 718.204(b)(2), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if in addition, the tests reveal qualifying FVC or MVV

[7] See footnote 6 above. Although Dr. Baker stated "No" on the form when asked whether he was a B-reader, it appears that he was recertified on June 1, 2002, the date that he interpreted the x-ray taken on that date.

[8] Dr. Dahhan erroneously listed an age of 64 based upon an incorrect birth date (June 1938 instead of January 1934).

values under the tables, or an FEV1/FVC ratio of less than 55%. All of the tests produced qualifying results based upon the FEV1 and the FEV!/FVC ratio and/or the MVV.[9]

Arterial blood gases were taken on June 1, 2002 (DOL Baker examination) (DX 10) and August 7, 2002 (Dahhan examination, Employer Initial Evidence) (DX 11). No exercise testing was performed on June 1, 2002 due to the Claimant's ischemic heart disease (DX 10) and the exercise test begun on August 7, 2002 was terminated due to fatigue after ten seconds (during which his pulse went from 92 to 105) (DX 11). The ABGs produced the following values, which were not qualifying under Part 718, Appendix C:

Exhibit No.	Date	Physician	pCO2	pO2	Qualifying?
DX 10	06/01/2002	G. Baker	43 (rest)	71 (rest)	No
DX 11	08/07/2002	A. Dahhan	42.7 (rest) 41.9 (partial exercise)	71.9 (rest) 82.6 (partial exercise)	No No

Medical opinions were rendered by three physicians, but only two of the physicians offered opinions that may be deemed to be reasoned medical opinions under the regulations. Specifically, opinions were issued by Dr. Glen Baker in connection with the June 1, 2002 Department of Labor examination of the Claimant (DX 10) (DOL examination) and a May 16, 2001 worker's compensation examination (DX 12) (Claimant's Initial Evidence, submitted (but not designated) by Claimant and designated by Director);[10] and by Dr. Abdul Dahhan in connection with an August 7, 2002 examination of the Claimant (DX 11) (Employer's Initial Evidence). Although the Employer also designated Dr. Bruce Broudy's January 30, 2003 report as a medical opinion (DX 13) (Employer's Initial Evidence), it is more properly considered solely as an x-ray interpretation.

Background and Employment History

Claimant was the only witness to testify at the hearing. He had difficulty remembering dates and specific information concerning his employment and medical history.

In particular, Claimant's coal mine employment history is unclear from his testimony. Specifically, Claimant testified that he first started working in the coal mines, driving a truck and working around the tipple, in 1949 or 1950. (Tr. 15-16). He testified that he worked for Oneida Mining, which he indicated was the same as Wildcat Coal and Betty Oma Coal, followed by A. J. Shepherd Coal. (Tr. 16-17). However, he could not recall working for Lloyd Baker Coal. (Tr. 18).[11] Subsequently, he worked for Shepherd Hale for "[n]ot very long," and for Hi Flame Coal. (Tr. 17-18). Claimant was uncertain about whether he worked without interruption or

[9] For the August 2002 test, the MVV values were qualifying both pre- and post-bronchodilator, but only the pre-bronchodilator FEV1/FVC ratio was qualifying. No MVVs were recorded for the May 2001 and June 2002 tests.

[10] Although Claimant submitted the worker's compensation report by Dr. Baker, he did not list it on his designation form. Moreover, the report adds little to the later DOL examination report by Dr. Baker. Nevertheless, it was designated by the Director and has not been opposed. Accordingly, it will be considered.

[11] The coal companies that he was questioned about were referenced in Mr. Darrell Shepherd's statement as companies that Mr. Shepherd worked for. Mr. Shepherd left blank the portion of the form requesting information as to the miner's [Claimant's] employment. (Tr. 6).

whether he was laid off or shut down for a while, and he did not remember when he last worked in the mines. (Tr. 17-18). However, he believed that Hi Flame was his last employer, because that was where he got hurt, rupturing his spleen when the bulldozer gear shift struck him in his side. (Tr. 18, 19). All of his work was in the surface coal mines, working around the tipple, driving a truck, loading trucks, running a bulldozer, and running a high lift. (Tr. 18-19). He testified that he was exposed to dust all the time doing these various jobs. (Tr. 18).

On cross examination, Claimant provided additional information concerning his coal mine employment history. He recalled working for S & H Coal Company in 1975, running a bulldozer and a high lift on a strip job, in an area where he inhaled coal dust. (Tr. 27-29). He does not recall how long he worked there but estimated it was less than one year, because the company went out of business. (Tr. 29). Between 1972 and 1975, he may have worked for Jimmy Sizemore and Johnny Caudill, in a strip mining operation, running a high lift, bulldozer, and grader, and he also loaded the coal. (Tr. 30, 31). He was also exposed to coal dust during that employment. (Tr. 30-31). However, he "couldn't say" whether it was one year or more. He made approximately $2.00 to $2.25 per hour when he worked for S & H Coal Company as well as when he worked for Sizemore and Caudill. (Tr. 29, 31). He may have worked for other employers between 1972 and 1975 but cannot recall. (Tr. 31).

Claimant testified that he also worked outside of the coal mines, driving a steel truck, after he left Hi Flame. (Tr. 19). His employer at that time was Hyden Trucking, and he did not haul any coal for that employer. (Tr. 27). Subsequently he got a truck of his own and he also hauled steel. (Tr. 27, 32-23). He could not recall how long he did that kind of work. (Tr. 19, 27). In 1992, he worked for the Clay County Board of Education, driving a school bus for approximately six months. (Tr. 33). He passed the pre-employment physical examination for that job. (Tr. 33). He also had to have a physical to get his CDL license to haul steel. (Tr. 34).

According to Claimant, his lung trouble and breathing problems dated from the time he was working in the coal industry and continued to the present. (Tr. 19-21). At night, after he stopped working for Hi Flame and driving the steel truck, he had to prop up two or three pillows in order to sleep. (Tr. 20-21). He received medical treatment and was prescribed breathing pills and an inhaler. (Tr. 21). At the present time, his activities are restricted because he runs out of breath, and he cannot walk or climb stairs without stopping. (Tr. 21). He does not believe that he could return to his work driving a truck. (Tr. 22). In fact, he quit his work driving a steel truck because he was unable to load the trucks or tie them down with a chain. (Tr. 22). When he hauled steel in his own truck, he also had to tarp the truck and change flats. (Tr. 33). At the time he drove a coal truck, he was not required to tarp them down. (Tr. 22). However, he does not believe that he could drive a coal truck due to his "breathing and stuff." (Tr. 22). On cross examination, Claimant testified that he quit work in 1998 because he could not do it any more. (Tr. 34). However, he admitted that at the time of his deposition, he stated that he quit work because the fuel prices got so high that he could not make a profit. (Tr. 35). When prompted by his wife at the deposition, he said that he was sick also, and he later explained that his breathing was part of the reason he stopped working in 1998. (Tr. 42-43). He also admitted that he was able to do his own yard work, including riding a lawnmower, once in a while. (Tr. 39-40).

On cross examination, Claimant testified that he was still married and lived with his wife and no one else. (Tr. 22-23). He is currently drawing Social Security based on his age, as well as SSI. (Tr. 23). At the time of the hearing, Claimant was seventy years old. (Tr. 40-41).

Claimant believed that he was referred to a doctor after he filed a state worker's compensation claim; he was first sent to Lexington and then to Tennessee, on the "other side of Somerset." (Tr. 20). He testified that he did not receive an award. (Tr. 20).

Claimant identified his worker's compensation application, which was marked and admitted as ALJ 1. (Tr. 25, 45). The claim related to both black lung and his bulldozer injury and reflects an injury in July of 1972. (ALJ 1, Tr. 26). Specifically, the July 20, 1973 claim form lists under section 7, relating to nature of injury or disease: "Ruptured spleen and removal, injuries to stomach, surgery required and two hernias resulting (injury)" and "Silicosis and/or pneumoconiosis." (ALJ 1).

Claimant testified that he suffered from other medical conditions. For a long time, and prior to quitting his self employment in 1998, he had developed problems with high blood pressure and arthritis in his hips and hands. (Tr. 35-36). He was diagnosed with emphysema about 12 years ago. (Tr. 36). Also, he had a diagnosis of heart blockage about two years ago, when he had an artery blocked about 40 or 50 percent, and he was given a pill to clear it up. (Tr. 36). He is currently on multiple medicines, and specifically Hydralazine and Altace for heart and blood pressure, prescribed by Dr. McDaniel; Plavix from the same doctor; Topol, for heart and blood pressure, prescribed by Dr. Jadhav; and Theo24, for wheezing and breathing, prescribed by Dr. McDaniel. (Tr. 36-38). Claimant testified that he may have had pneumonia when his spleen or hernia was removed but he does not recall having had it five years before Dr. Baker examined him. (Tr. 44).

Claimant's smoking history is unclear but is clearly in excess of 30 pack years and may exceed 40 pack years. Claimant testified that he was a former smoker, having started when he was 12 years old, but that he had not smoked at all for the past 17 years (i.e., stopping when he was approximately 53).[12] (Tr. 38-39). When he smoked, he smoked "[m]aybe a pack or two a day." (Tr. 40). Claimant testified that he gave up smoking several times during the approximately 40-year period over which he smoked but was unable to quantify the amount of time that he did not smoke. (Tr. 41). Dr. Dahhan recorded a 32-pack year history based upon one pack per day for 32 years, from age 18 to age 50. (DX 11). In 2002, Dr. Baker recorded a smoking history of "up to 2 PPD" spanning a 41-year period from age 12 (1946) until 15 years before (1987), similar to his testimony (amounting to a total of up to 82 pack years), while in 2001 he recorded a history of smoking for 20 years at a rate of 1 to 2 packs per day, quitting 10 to 12 years ago (amounting to a total of 20 to 40 pack years). (DX 10, 11). I find that 35 pack years is a conservative estimate.

I find that Claimant has established a total of eight years of coal mine employment extending over a 24- to 25-year period. My review of the Social Security records, considered in the context of Claimant's testimony and the other evidence of record, substantiates 32 quarters of

[12] He agreed with testimony that he gave at his September 2002 deposition to the effect that he had not smoked for 15 years. (Tr. 38).

coal mine employment from 1951 until 1975, for a total of eight years of qualifying coal mine employment. (DX 7).

I also find that Hi Flame Coals, Inc. is the properly named responsible operator. The Social Security records show Claimant's last coal mine employment was for Darrell Shepherd & Gilbert Hale, proprietors of S & H Coal Company in Gray Hawk, Kentucky, for a single quarter (July to September) of 1975 and the records do not show other employment by that employer (although Claimant was employed for Shepherd & Shepherd, Shepherd Coal Co., Oneida, KY for two quarters, in 1956 and 1957). The Social Security records reflect that Claimant's last coal mine employment prior to S & H Coal (and therefore his last coal mine employment of a cumulative period of at least one year) was his seven quarters of employment with Hi Flame Coals Incorporated, Manchester, Kentucky, from 1970 to 1972. (DX 7).

Discussion and Analysis

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.,* 23 B.L.R. 1-47 (2004) (en banc), BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3), *citing* 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id., citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id., citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id., citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id., citing* 20 C.F.R. §725.456(b)(1).

The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.,* 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey, supra.* First, the Board found that it was error to exclude CT scan evidence because it was not covered by the evidentiary limitations and instead could be considered "other medical evidence." *Dempsey* at 5; s*ee* 20 C.F.R. § 718.107(a) (allowing consideration of medical evidence not specifically addressed by the regulations). Second, the Board found that it was error to exclude pulmonary function tests and arterial blood gases derived from a claimant's medical records simply because they had been proffered for the purpose of exceeding the evidentiary limitations. *Dempsey* at 5. Third, the Board held that state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at § 725.414. In so holding, the Board noted that such records did not fall within the exceptions for hospitalization or treatment records or for evidence from prior federal black lung claims. *Dempsey* at 5.

In this case, the parties have complied with the evidentiary limitations.

Merits of the Claim

To prevail in a claim for Black Lung benefits, a claimant miner must establish that he or she suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he or she is totally disabled, as defined in section 718.204; and that the total disability is due to pneumoconiosis. 20 C.F.R. §§718.202 to 718.204. The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. *Id.* Thus, in order to prevail in a black lung case, a claimant must establish each element by a preponderance of the evidence.

Existence of Pneumoconiosis

The regulations (both in their original form and as revised effective January 19, 2001) provide several means of establishing the existence of pneumoconiosis: (1) a chest x-ray meeting criteria set forth in 20 C.F.R. §718.102, and in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting x-ray reports; (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. §718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" set forth in 20 C.F.R. §718.304 (or two other presumptions set forth in §718.305 and §718.306); or (4) a determination of the existence of pneumoconiosis as defined in §718.201 made by a physician exercising sound judgment, based upon objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. §718.202(a) (1)-(4). Under section 718.107, other medical evidence, and specifically the results of medically acceptable tests and procedures which tend to demonstrate the presence or absence of pneumoconiosis, may be submitted and considered. At least one United States Court of Appeals (the Fourth Circuit) has held that all of the evidence from section 718.202 should be weighed together in determining whether a miner suffers from pneumoconiosis. *See, e.g., Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-209 (4th Cir. 2000).

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp*., 9 B.L.R. 1-131 (1986).

In the recent amendments to the regulations, the definition of pneumoconiosis in section 718.201 has been amended to provide for "clinical" and "legal" pneumoconiosis and to acknowledge the latency and progressiveness of the disease. Legal pneumoconiosis is defined as "any chronic lung disease arising out of coal mine employment." 20 C.F.R. §718.201(a). The regulation further indicates that a lung disease arising out of coal mine employment includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

X-Ray Evidence. The x-ray evidence submitted in connection with the instant case is summarized above. One x-ray (taken on May 16, 2001) was interpreted as positive for pneumoconiosis, one (taken on June 1, 2002) was interpreted by one reader as positive for pneumoconiosis and by another as negative, and one (taken on August 7, 2002) was interpreted as negative for pneumoconiosis. The first of Dr. Baker's readings (of the May 16, 2001 x-ray) was made when he was an A-reader but the second reading (of the June 1, 2002 x-ray) was made when his B-reader certification had been reinstated. Both of the negative readings, including the single reading of the most recent (August 7, 2002) x-ray, were made by B-readers. The regulations provide that in the event of conflicting x-ray reports, consideration is to be given to the radiological qualifications of the persons interpreting x-ray reports. Therefore, I give additional weight to the B-readings, two out of three of which were negative for pneumoconiosis. Claimant has failed to meet the preponderance of the x-ray evidence standard in establishing pneumoconiosis, and Claimant cannot prevail under 20 C.F.R. §718.202(a)(1).

Autopsy or Biopsy Evidence. There is no pathological evidence of record. I therefore find that the Claimant has not established that he suffers from pneumoconiosis under 20 C.F.R. §718.202(a)(2).

Medical Opinions on Pneumoconiosis. In addition to the x-ray readings (discussed above), medical opinions of two doctors (Dr. Glen Baker and Dr. Abdul Dahhan) addressed the issue of whether the Claimant suffers from pneumoconiosis.

Glen Baker, M.D. Dr. Baker, a board-certified pulmonary medicine specialist, examined the Claimant on June 1, 2002 for the Department of Labor. Dr. Baker recorded a detailed history (including employment history, family history, medical history, and social history); a list of complaints and symptoms and their duration; detailed physical findings; and a summary of diagnostic testing. Dr. Baker listed the following cardiopulmonary diagnoses (and respective bases for the diagnoses):

1. Coal Workers' Pneumoconiosis 1/0: abnormal chest x-ray and coal dust exposure.
2. COPD [chronic obstructive pulmonary disease] with severe obstructive defect: PFTS [pulmonary function tests]

3. Chronic bronchitis: history of cough, sputum production and wheezing
4. Hypoxia: PO_2
5. Ischemic heart disease: by history, Angiogram 55%

When asked the etiology of these diagnoses, Dr. Baker listed "coal dust exposure" for the first diagnosis, "coal dust exposure/cigarette smoking" for the second, third and fourth diagnoses; and ASHD [arteriosclerotic heart disease] for the fifth diagnosis. As a noncardiopulmonary diagnosis, Dr. Baker listed "anemia." In a supplemental form appended to the medical report form, Dr. Baker checked the boxes indicating that the Claimant had an occupational lung disease caused by his coal mine employment, based upon an abnormal chest x-ray and coal dust exposure, and he characterized the extent of the pulmonary impairment as "Severe Impairment" and listed both cigarette smoking and coal dust exposure in the section of the form relating to etiology. Finding, he opined that the Claimant did not have the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment. When asked for a detailed rationale, he merely stated "FEV_1 38%" (DX 10).

Dr. Baker also furnished a form report based upon a worker's compensation examination conducted on May 16, 2001. That report also included a detailed history and findings. Dr. Baker made the same diagnoses and listed the same bases as above, except for hypoxia and ischemic heart disease, which were not listed. He reached the same conclusions with respect to the causation of the disability, but he went on to say:

> Patient has a 30 year history of dust exposure and x-ray evidence of pneumoconiosis. He also has a heavy smoking history. It is thought that any pulmonary impairment is caused at least in part by his coal dust exposure.

(DX 12).

Abdul Dahhan, M.D. Dr. Dahhan, also a board-certified pulmonary medicine specialist, examined the Claimant on August 7, 2002. He inaccurately listed the Claimant's age as 64 years old instead of his correct age of 68. However, he prepared a detailed report summarizing a review of systems, past history, examination findings, and clinical test results. Dr. Dahhan stated:

> In conclusion, based on the above occupational, clinical, radiological and physiological evaluation of this patient, within a reasonable degree of medical certainty, the following conclusions can be made:
>
> 1. There is insufficient objective findings to justify the diagnosis of coal workers' pneumoconiosis based on the obstructive abnormalities on clinical examination of the chest, obstructive abnormalities on spirometry testing with response to bronchodilator therapy, negative x-ray readings for pneumoconiosis, alteration in the blood gas exchange mechanisms at rest that subsides with exercise.
>
> 2. Mr. Hyden has an obstructive airway disease.

> 3. From a respiratory standpoint, Mr. Hyden does not retain the physiological capacity to continue his previous coal mining work or job of comparable physical demand because of his obstructive airway disease.
>
> 4. Mr. Hyden's obstructive airway disease was not caused by, related to, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis.
>
> 5. He has not had any exposure to coal dust since 1980, a duration of absence sufficient to cause cessation of any industrial bronchitis that he may have. Furthermore, his obstructive airway disease demonstrates response to bronchodilator therapy despite already being on multiple bronchodilators prescribed by his family physician who believes that his condition is responsive to such therapy. This is another finding that is inconsistent with the permanent adverse affects of coal dust on the respiratory system.
>
> 6. Mr. Hyden suffers from hypertension, peptic ulcer disease, post splenectomy and anemia. All are conditions of the general public at large and are not caused by, related to, contribute to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis.

(DX 11).

In reviewing the reports of both of these physicians, I find Dr. Dahhan's to be better reasoned and documented. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (BRB 1987) (explaining that a "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis, and a "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions). In this regard, Dr. Dahhan has pointed to various test results and findings that he has relied upon in support of his determination that the Claimant's respiratory condition is not attributable to coal dust exposure. Although Dr. Dahhan assumed that Claimant was four years younger than his actual age, I do not find that to be a basis for discrediting his opinion, which is otherwise well documented and well reasoned. In contrast, Dr. Baker has merely listed the Claimant's exposure to coal dust and his abnormal x-ray in support of his diagnosis. However, as stated above, I do not find the x-ray evidence as a whole to support a finding of pneumoconiosis, as two equally qualified readers disagreed with Dr. Baker's positive interpretation. Further, Dr. Baker has assumed an inflated coal mine employment history of 30 years, as opposed to the eight years (extending over a 25-year period, at most) that the evidence shows. In any event, coal dust exposure alone is an insufficient articulated basis for a diagnosis of pneumoconiosis. *See, e.g., Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 B.L.R. 2-323 (4th Cir. 1998) It is the Claimant's burden of proof and he had not met that burden with Dr. Baker's essentially conclusory opinion. As a whole, I find that the preponderance of the medical opinion evidence does not support a finding of clinical or legal pneumoconiosis.

Other Evidence of Pneumoconiosis. There is no other evidence of record on the issue of pneumoconiosis.

All Evidence on Pneumoconiosis. Taking into consideration all of the evidence on the issue of the existence of pneumoconiosis, I find that the Claimant has failed to establish pneumoconiosis based upon the evidence of record considered as a whole.

CONCLUSION

Claimant cannot establish a necessary element of a claim for benefits under the Black Lung Benefits Act. Accordingly, this claim must be denied and it is unnecessary to address the remaining issues.

ORDER

IT IS HEREBY ORDERED that the claim of Charles Hyden for black lung benefits be, and hereby is, **DENIED.**

A
PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of the Notice of Appeal must also be served on the Associate Solicitor for Black Lung Benefits at the Frances Perkins Building, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.